JAN 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1923

JAMES O. EASTLAND, *et al.*,
Petitioners,

UNITED STATES SERVICEMEN'S FUND, *et al.*

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Petitioners,

v.

NATIONAL PEACE ACTION COALITION, *et al.*

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Petitioners,

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, *et al.*

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Petitioners,

v.

PROGRESSIVE LABOR PARTY, *et al.*

JOINT BRIEF OF RESPONDENTS

NANCY STEARNS
c/o Center for Constitutional Rights
853 Broadway
New York, N. Y. 10003

JEREMIAH S. GUTMAN
c/o American Civil Liberties Union Foundation
363 Seventh Avenue
New York, N. Y. 10001

Attorneys for Respondents

INDEX

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. RESPONDENTS' BANK RECORDS ARE PROTECTED BY THE FIRST AMENDMENT 10

A. Membership Lists And Other Compendia Of Personal Identities, Including Those In The Form Of Bank Records, Are Beyond The Reach Of The Subpoenas At Issue 10

B. The Absence Of A Privileged Relationship Between The Banks To Whom The Subpoenas Were Addressed And The Respective Respondent-Depositors Does Not Render The Bank Records Amenable To Subpoenas..... 18

C. The Absence Of An Over-riding And Compelling State Interest For Securing The Data Requires Invalidation Of The Subpoenas 25

D. The Subpoenas Are Overbroad And Therefore Void 35

Index Continued

E. The Fact That The Data Which The Respondents Seek To Protect And Petitioners Seek To Invade May In Part Be On File With The Internal Revenue Service Does Not Destroy Respondents' First Amendment Rights..... 37

II. THE SPEECH OR DEBATE CLAUSE DOES NOT PREVENT COURTS FROM CONSIDERING THE CONSTITU - TIONALITY OF A CONGRESSIONAL COMMITTEE SUBPOENA BEFORE COMPLIANCE WHEN A FAILURE TO GIVE SUCH CONSIDERATION WOULD IN AND OF ITSELF RESULT IN SERIOUS DEPRIVATION OF FIRST AMENDMENT RIGHTS..... 39

A. Federal Courts Are Constitutionally Required In Appropriate Cases To Pass Upon The Constitutionality Of Congressional Subpoenas... 40

B. The Speech Or Debate Clause Does Not Immunize From Judicial Review All Allegedly Unconstitutional Acts By Members Of Congress And Their Aides..... 41

C. The Actions Challenged In This Litigation Are Neither Speech Nor Debate.... 51

CONCLUSION 61

CITATIONS

Cases:

Alexander v. Americans United , ___ U.S. __, 94 S.Ct. 2053 (1974) 61,62
Ansara v. Eastland, 442 F.2d 751 (D.C. Cir., 1971)....55,56,57,58 61,62
Bates v. City of Little Rock, 361 U.S. 516 (1960)..... 11
Burroughs v. Superior Court of San Bernadino County, #20308 (Cal. Sup. Ct., Dec. 27, 1974)... 22
California Bankers Association v. Schultz, 416 U.S. 21, 94 S.Ct. 1494 (1974).....18,20
Couch v. United States, 409 U.S. 322 (1973).....18,19
Doe v. McMillan, 412 U.S. 306 (1973).....42,51,52,53
Dombrowski v. Eastland, 387 U.S. 82 (1967).....43,47
Donaldson v. United States, 400 U.S. 517 (1971).....18,19
Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963).....12,14,26,28,29,31,34
Gojack v. United States, 384 U.S. 702 (1966).....31,40
Gravel v. United States, 408 U.S. 606 (1972).....42,43,45,50

Kilbourn v. Thompson, 103 U.S. 168 (1881)..... 43,47
Louisiana ex rel Gremillion v. NAACP, 366 U.S. 293 (1961).... 12,14
McSurely v. McClellan, No.23,845 (D.C.Cir.,March 26, 1970)..... 57
NAACP v. Alabama, 357 U.S. 449 (1958).....11,14,25,33
NAACP v. Button, 371 U.S. 415 (1963)..... 37
Pollard v. Roberts, 283 F.Supp. 248 (E.D.Ark. 1968), aff'd per curiam, 393 U.S. 14(1968)..... 12
Perlman v. United States, 247 U.S. 7 (1918)..... 59
Powell v. McCormack, 395 U.S. 486 (1969).....42,43,45,46,50
Sanders v. McClellan, 463 F.2d 894 (D.C. Cir., 1972)..... 58
Speiser v. Randall, 357 U.S. 513 (1958)..... 23
Tenney v. Brandhove, 341 U.S. 367 (1951)..... 43
United States v. Brewster, 408 U.S. 501 (1972).....42,52
United States v. Johnson, 383 U.S. 169 (1966).....43,44
United States v. Nixon, ___U.S. ___, 94 S.Ct. 3090 (1974)..... 59
United States v. Rumley, 345 U.S. 41(1953)..... 40
Watkins v. United States, 354 U.S. 178(1957).....31,40
Yellin v. United States, 374 U.S. 109 (1963).....31,40

Constitution and Statutes:

Art.I, Sec.6, Cl. 1 ..... passim
First Amendment ..... passim
Fifth Amendment 19

26 U.S.C. 6103(d)(1)(A)..... 39

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974
NO. 73-1923

JAMES O. EASTLAND, et al., Petitioners

UNITED STATES SERVICEMEN'S FUND, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al.,

Petitioners

v.

NATIONAL PEACE COALITION, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al.,

Petitioners

v.

PEOPLES COALITION FOR PEACE AND JUSTICE, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al.,

Petitioners

v.

PROGEESSIVE LABOR PARTY, et al.

JOINT BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

Can a court, at the instance of a membership organization and in the absence of a showing that the records are unavailable from the membership organization itself, enjoin enforcement or declare invalid a Congressional Committee subpoena directed to a bank seeking records of all deposits, withdrawals and other transactions by the membership organization?

May such a judgment issue as against the Senators and Congresspersons themselves?

May such a judgment issue as against Congressional staffpersons?

STATEMENT OF THE CASE

Respondents, pursuant to Rule 40 Subdivision 3 of the Supreme Court Rules, deem necessary only the following corrections of inaccuracies and omissions in the statement of the case provided by petitioners.

Respondents did before the District Court and the Court of Appeals brief and argue the invalidity of the underlying resolutions pursuant to which the subpoenas were issued by the committees respectively.

The rationale of the petitioners in all cases and of Judge MacKinnon in his dissent sounds in the theory of right of governmental self protection. No showing was made, or attempted or

could be made that the information sought could not have been obtained from the records of the organizations themselves. Respondents would thus have been able to resist directly any subpoena served upon them. Petitioners chose, however, the indirect method of issuing and serving subpoenas upon four banks into which the organizations had respectively deposited their contributions. The petitioners cannot and do not deny that the respondents have complete records and documents embodying all of the data sought.

At the hearing, it was established (Appellants App. 229 ff.)* and the Court of Appeals found

*Appellants App. refers to Appellant's Appendix in Court of Appeals below which is part of the record herein.

(App. 73) that there was an actual loss of some half of the funds available to respondent USSF as a result of the mere service of the subpoena upon that organization. There was, in addition, substantial expert testimony as to the disastrous effect to be expected by threat of disclosure (Appellants App. 15 ff.) and the actual seriously damaging net result to USSF in particular. (App. 73 f.n.9). As to the other three consolidated cases, there were no hearings but all parties, and the Court of Appeals, have treated all as identical in these and other respects.

Petitioners have suggested (Brief p.9) that an inquiry received by respondent USSF concerning its tax exempt status might have been a cause of

damage, but the fact is that there was no evidence of any actual adverse effect from the mere inquiry.

SUMMARY OF ARGUMENT

The bank records of respondent membership organizations are functionally the equivalent of their membership lists revealing the identities of supporters and the extent of individual membership contributions. They would further reveal the nature and extent of disbursements of various associational activities protected by the First Amendment. By addressing subpoenas to the banks, the petitioners seek to secure indirectly what this Court has on numerous occasions held to be unavailable by direct subpoena. The fact that there is no traditionally or statutorily generally recognized privilege which a depositor might assert against a banker renders it all the more

necessary that the respondent-depositors have standing to enjoin or secure a declaration of invalidity against such subpoenas.

The subpoenas themselves are overbroad and vague and constitutionally void.

Petitioners have failed to allege or prove any overriding or compelling governmental interest in securing the privileged data which enforcement of the subpoenas would reveal. The fact that some or even all of the information sought may be on file with the Internal Revenue Service does not constitute a justification for access to such data by petitioners.

The service and attempted enforcement of the subpoenas at issue do not

come within the immunization of the Speech or Debate Clause of the Constitution for the reaching from the halls of Congress by subpoena toward the bank records of the respondents is an extramural act, the constitutionality of which is a proper subject for judicial review. The bar of the Speech or Debate Clause protects neither the Members of Congress nor their aides, since such protection as is offered by that Clause for intramural acts does not extend to extramural acts and the protection against litigation is identical for both Members of Congress and Congressional employees.

I.

RESPONDENTS' BANK RECORDS ARE PROTECTED BY THE FIRST AMENDMENT

A.

MEMBERSHIP LISTS AND OTHER COMPENDIA OF PERSONAL IDENTITIES, INCLUDING THOSE IN THE FORM OF BANK RECORDS, ARE BEYOND THE REACH OF THE SUBPOENAS AT ISSUE.

It is a constitutional principle of long standing that membership lists of organizations, particularly those of a politically controversial nature, are protected by the First Amendment against compulsory disclosure. The Alabama Attorney General sought disclosure of the membership list of the National Association for the Advancement of Colored People [NAACP]. When the NAACP refused to comply with a court order compelling such disclosure,

it was held in contempt. Mr. Justice Harlan, writing for a unanimous Court, ruled that Alabama could not constitutionally compel disclosure of the NAACP membership list. He stated:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. NAACP v. Alabama, 357 U.S. 449, 462 (1958).

Similarly in 1960 this Court rebuffed an attempt by the City of Little Rock to obtain the membership lists of the NAACP and the identities of its official contributors. Bates v. The City of

Little Rock, 361 U.S. 516 (1960). See also Louisiana ex rel.Gremillion v. NAACP, 366 U.S. 293 (1961): Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). In fact, the principle of confidentiality of membership lists of private associations is now beyond dispute.

Respondents have argued,and the Circuit Court has agreed, that the bank records of the United States Servicemen's Fund,[1] which contain the names of both financial contributors and persons and organizations to which the organization provides financial support, are the functional equivalent of the membership records.

1. As well as those of the three other organizations involved on this consolidated record.

Nor is this a novel assertion. In Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark. 1968) aff'd per curiam, 393 U.S. 14 (1968), a case indistinguishable from this one, a District Attorney, acting as a grand jury under Arkansas law, sought to subpoena the bank records of the Arkansas Republican Party. Judge Henley, joined by Judge Harris and now Mr. Justice BLACKMUN, sitting as a three judge court, recognized the First Amendment nature of the records and said:

> These records, if produced, would reveal information not only as to sums of money contributed to the party during the 1966 campaign . . . but also would identify individual contributors from all over the State whose contributions were deposited in the account in question and would reveal the amounts of individual contributions.
> 283 F. Supp. at 251-252.

Relying on such cases as NAACP v. Alabama, supra; Bates v. City of Little Rock, supra; Louisiana ex rel Gremillion v. NAACP, supra; and Gibson v. Florida Legislative Investigation Committee, supra, the Court went on to note that such records, because they contain the identities of financial contributors, must be protected both because of the danger of reprisals against contributors resulting from disclosure, and because the mere threat of disclosure might tend to discourage both membership and contributions to the party:

> The Alabama, Arkansas, Florida, and Louisiana First Amendment cases which have been cited make it clear that the First Amendment protects freedom of association and privacy of association. It also protects freedom to participate in political life without unjustified governmental interference.

> While there is no evidence of record in this case that any individuals have as yet been subjected to reprisals on account of the contributions in question, it would be naive not to recognize that the disclosure of the identities of contributors to campaign funds would subject at least some of them to potential economic or political reprisals of greater or lesser severity.
>
> Apart from fear of actual reprisal, many people doubtless would prefer not to have their political party affiliations and their campaign contributions disclosed publicly or subjected to the possibility of disclosure merely because an officer or agency clothed with investigatory powers may suspect that some members of their party may have violated the law. Disclosure or threat of disclosure well may tend to discourage both membership and contributions thus producing financial and political injury to the party affected . 283 F. Supp. at 258.

This Court per curiam affirmed the order enjoining, at the suit of an officer of the Republican Party, the enforcement of the subpoena against the

bank. The three judge Court recognized that two aspects of First Amendment interests were involved, both judicially cognizable, in a suit brought on behalf of the membership organization. First, the interest of the financial contributors in confidentiality and privacy of association because of fear of reprisal; second, the interest of a legal, albeit controversial organization to be protected against financial and political injury it would suffer if its members or financial supporters were faced with exposure. Both First Amendment interests are at stake here. It would hardly seem to require proof that many contributors and members will flee from a controversial organization in the face of a threat of exposure of their identities

but those facts were nonetheless evidentiarily established below. Not only was there expert testimony regarding the desire for anonymity on the part of the contributors to controversial organizations such as each of the respondents admittedly is, Appellant's App. A 207, A 209, A 202, A 216, A 217, A 212, A 225-7, there was also testimony from officers of respondent USSP that since knowledge of the subcommittee subpoena had become public, substantial donors had been lost to the organization (Appellants App. A 201-202). The organization lost so many contributions it had to cut its activities by half (Appellants' App. A 229-30).

B.

THE ABSENCE OF A PRIVILEGED RELATIONSHIP BETWEEN THE BANKS TO WHOM THE SUBPOENAS WERE ADDRESSED AND THE RESPECTIVE RESPONDENT-DEPOSITORS DOES NOT RENDER THE BANK RECORDS AMENABLE TO SUBPOENAS.

Petitioners have sought to ignore the obvious First Amendment nature of the records they seek by arguing that the records are the property of the bank and that there is no banker-customer privilege, such as the attorney-client privilege, which would require that those records be kept confidential. In support of their argument they cite Donaldson v. United States, 400 U.S. 517 (1971); Couch v. United States, 409 U.S. 322 (1973) and California Bankers Association v. Schultz, 416 U.S. 21, 94 S.Ct. 1494 (1974). Petitioners' argument however, and the

cases they rely on are irrelevant since neither respondents, nor the Court of Appeals in its opinion below, asserted any banker-depositor privilege but rather rest their argument on the nature of the information contained in the records and the long established First Amendment protection for that sort of information. None of the three cases relied on by petitioners above deals with First Amendment protected material. Rather, Donaldson deals with a taxpayer's effort to halt the Internal Revenue Service from obtaining routine business records of his employer, while Couch deals with a taxpayer's Fifth Amendment efforts to prevent the Internal Revenue Service [IRS] from obtaining her business records from her accountant.

Finally, California Bankers Ass'n, supra, 416 U.S. at 94 S.Ct. at 1515, deals with record keeping requirements under federal statute and expressly states that no disclosure of records had actually been sought by the government and therefore the assertion of First Amendment rights was premature.

Were there a banker-depositor or customer privilege, respondents' case might be less compelling. If each of the banks were under a duty imposed by law not to make disclosure without a waiver of privilege by the depositor in each case, each of the respondents might be asked to rely upon its bank to obey the law and respect the privilege. The absence of the availability of such a defense by the banks to the subpoenas at

issue underscores the compelling need for whatever objection to disclosure each depositor may have being asserted by that depositor in such proceedings as those herein. Thus, the argument by petitioners, stressing the absence of privilege, is in reality an argument in support of the justiciability of the issue at the suit of the respondents and presents another compelling reason for recognizing the standing of respondents to assert the First Amendment claims which each of them would undeniably have been able to present had the subpoenas been served upon them for their own records, rather than upon their bankers for the same information in the files of the banks.

Only last week the Supreme Court of California ruled that bank depositors are entitled to certain protections against disclosure of their records to police. In the case of Wesley S. Burroughs v. Superior Court of San Bernadino County, #20308 Cal. Sup. Ct. decided Dec. 27, 1974 the Court ruled that turning the records over to the police without "the scrutiny of a neutral magistrate" violates a person's reasonable expectation of privacy.*

The Court spoke of the "intimate and confidential relationship" between the bank and its depositor and recognized that "the disclosure by individuals or business of their financial

* New York Times, Jan. 2, 1975, p. 10:3 Respondents will furnish the official citation to the Court as soon as it is available.

affairs to a bank is not entirely volitional, since it is impossible to participate in the ecoromic life of contemporary society without maintaining a bank account." The Court also noted that bank records provide "a virtual current biography" of the depositor's personal affairs, opinions, habits and associations.

For these reasons, the California Supreme Court concluded that the police may not have access to a depositor's records free from judicial scrutiny at the request of the depositor.

This principle which the Supreme Court of California has just applied to an individual depositor certainly applies as well to a First Amendment protected organization. It is this judicial

scrutiny which respondents sought and the Court of Appeals correctly provided, determining that petitioners' efforts to obtain the bank records in question were in violation of the First Amendment.

C.

THE ABSENCE OF AN OVERRIDING AND COMPELLING STATE INTEREST FOR SECURING THE DATA REQUIRES INVALIDATION OF THE SUBPOENAS.

1. **Petitioners have not met their burden of proof.**

Petitioners attempt to evade the requirements of the First Amendment and to distinguish NAACP v. Alabama and the other cases we cite above by argument that the records of the NAACP had been protected in those cases because improper purposes on the part of state officials had been alleged and proven and by asserting that "there is no such proof here." (Petitioners' brief, p. 42.) This, however, is an incorrect statement of both the law and the facts. Once it is apparent that the information sought by the government falls within the

protection of the First Amendment, it is no longer the burden of the person or organization seeking protection to prove improper purposes, but rather, the burden shifts to the government to establish a compelling and overriding state interest and need for the information. Invalidating the subpoena of a Legislative Investigating Committee for NAACP records, Mr. Justice Goldberg, writing for a majority of the court observed:

> . . . it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest. Gibson v. Florida Legislative Investigation Committee, supra, 372 U.S. at 546.

Here, not only have petitioners failed to establish any compelling

need for the disclosure of First Amendment protected information, they have established virtually no justification at all other than their unsupported desire for the information.

The closest petitioners come to an explanation of their need for USSF's contributors list, or a connection with some alleged purpose, is found in the resolution of the subcommittee authorizing the challeged subpoena. That resolution states as follows:

> Whereas, information collected pursuant to the Subcommittee's resolution of October 14, 1967 /authorizing the investigation of the National Conference for New Politics/ makes a prima facie showing that the organizations and individuals hereinafter named should be subject of further investigation, it is directed that such investigation be carried forward by the

> staff; and that when the Chairman shall conclude that the results of staff investigation with respect to any such person or organization indicate the desirability of a hearing or hearings, the Chairman is authorized to issue appropriate subpoenas, including subpoenas duces tecum, to insure attendance of necessary witnesses and the production, if required, of material evidence. (App. 127).

That resolution goes on to list three pages of individuals and organizations which were presumably under the scrutiny of the suhcommittee, only one of which was respondent USSF.[3]

That resolution certainly does not meet the compelling need standards of Gibson and the other First Amendment cases. Nor, for that matter, has any

3. The identity of 3 or 4 of those individuals and organizations became public as a result of other litigation. The remaining three pages of names have remained secret.

connection been established by petitioners between the National Conference for New Politics [NCNP], the organization the subcommittee was purportedly authorized to investigate on October 14, 1967, and the United States Servicemen's Fund. In fact, it would have been difficult to demonstrate such a relationship since, as petitioners established at trial, NCNP was dissolved in April 1968 (Appellants' App. A 140), nine months before USSF was even incorporated. (Appellant's App. A 147).

In Gibson, this Court held that the NAACP could not be compelled to turn over its membership list to a legislative investigating committee where there had been no showing of "substantial connection between the Miami branch of

the NAACP and Communist activities" 372 U.S. at 551. Elsewhere there is noted "the utter failure to demonstrate the existence of any substantial relationship between the NAACP and subversive or communist activities." 372 U.S. at 354-5. Thus, inquiry into the membership of a legitimate civil rights organization would be permitted only if some connection with allegedly illegal activities could be shown.

Not only have petitioners failed to show any relationship between the NCNP and the United States Servicemen's Fund, even if such a relationship were demonstrated it would be insufficient to support this investigation and therefore the challeged subpoena. For there is no indication that

the NCNP was, during its short existence, anything but a legitimate political organization protected by the First Amendment. Here where no connection with illegal activity has even been alleged, and where the link with the perfectly legal and in fact constitutionally protected organization is non-existent, there is no justification for the use by defendants of compulsory process.[4] For as this Court concluded in Gibson:

> It is particularly important that

4. What is more, there is a substantial question as to whether the authorization of the investigation of the NCNP itself meets the tests of due process as set forth in Watkins v. United States, supra, and Yellin v. United States, 374 U.S. 109 (1963). And, or course, under the principles of Gojack v. United States, supra, if the authorization for the investigation of the NCNP falls, the authorization of the challeged subpoena must also fall.

> the exercise of the power of compulsory process be carefully circumscribed when this investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas.***
>
> To permit legislative inquiry to proceed on less than an adequate foundation would be to sanction unjustified and unwarranted intrusions into the very heart of the constitutional privilege to be secure in associations in the exercise of First and Fourteenth Amendment rights; to impose a lesser standard than we do here would be inconsistent with the maintenance of those essential conditions basic to the preservation of American democracy. 372 U.S. at 558.

2. Direction of the subpoenas to the banks rather than to organizations directly concerned has not been explained or justified by petitioners.

Since the information sought by the respective subpoenas is admittedly (petitioners' brief p. 40) in the records required by law to be kept by each of the respondents, and since a

subpoena served upon each of the respondents would have made it possible for a forum to be available for the assertion of the rights of each respondent, it is respectfully urged that petitioners have a burden to show not only an overriding and compelling state interest for the otherwise privileged information, but the burden of establishing that such information is not available from other sources such as the respondents directly. To permit service of such indirect subpoenas when such information is available from each of the organizations directly would be to emasculate the rules established by NAACP v. Alabama and the other cases cited above. It is precisely this position which is argued by petitioners,

apparently admitting that the Speech or Debate Clause would form no defense to an attack upon a direct subpoena subject to judicial review, but somehow providing a device for circumvention of the First Amendment by employment of the indirect or other devious subpoenas here attempted. Respondents urge that this Court articulate, in addition to the Gibson rule, calling for an over-riding and compelling state interest, the additional requirement that a subpoena to a third party for material within the ambit of the First Amendment cannot be validly issued or enforced at least in absence of a showing, in addition, that sensitive information sought cannot be procured by direct means.

"The State clearly has no

such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech." Speiser v. Randall, 357 U.S. 513, 529 (1958).

D.

THE SUBPOENAS ARE OVERBROAD AND THEREFORE VOID.

The four subpoenas at issue (App. 119-123) are substantially identical, calling for "any and all records appertaining to or involving the account or accounts of" the respondents respectively. They seek not only records of deposits and withdrawals but "all papers, correspondence, statements, checks, deposit slips and supporting documentation or microfirm thereof within your control or custody of within your means to

produce." Not only do these subpoenas seek every scrap of paper or other record in any way dealing with each of the respondents, but they purport to require the bank in each case "to produce" what they may have the means to go elsewhere to acquire from other sources. If indeed, the petititioners are interested in ascertaining only what may bear upon possible foreign sources of funding or other limited area of inquiry, the net has been thrown too wide and the interstices drawn too small. Petitioners make much argument to establish that the committees of Congress have the right to issue subpoenas duces tecum. Respondents do not argue with that general proposition. Respondents do contend, however, that a

subpoena must not only be properly authorized and must be issued in a manner providing due process of law in an appriate forum to persons whose First Amendment rights are threatened thereby, but that each such subpoena which impinges upon the area protected by the First Amendment must be drawn with that "narrow specificity" which this Court has required when the delicate and vulnerable freedoms of the First Amendment are involved. NAACP. v. Button, 371 U.S. 415, 433 (1963).

E.

THE FACT THAT THE DATA WHICH THE RESPONDENTS SEEK TO PROTECT AND PETITIONERS SEEK TO INVADE MAY IN PART BE ON FILE WITH THE INTERNAL REVENUE SERVICE DOES NOT DESTROY RESPONDENTS' FIRST AMENDMENT RIGHTS.

Petitioners argue that the law requires that tax exempt organizations such as the respondents must file with the Internal Revenue Service regular reports of receipts and disbursements, including identification of donors (and thereby members) and grantees. Respondents have complied but, as petitioners have pointed out (brief of petitioners p. 41),the IRS reports are confidential except with narrow, specific, statutory exceptions not including petitioners. Because respondents have complied with the Internal Revenue Code, petitioners would have it appear that they have thus somehow waived First Amendment rights. If this were so, every tax exempt organization would ipso facto be deprived of associational

privacy under the First Amendment. The fact that Congress has seen fit specifically to limit access to this delicate data to a limited number of governmental agents having specific need therefor (26 U.S.C. 6103(d)(1)(A)) would seem to establish a specific intent to preclude access by such committees as petitioners.

II.

THE SPEECH OR DEBATE CLAUSE DOES NOT PREVENT COURTS FROM CONSIDERING THE CONSTITUTIONALITY OF A CONGRESSIONAL COMMITTEE SUBPOENA BEFORE COMPLIANCE WHEN A FAILURE TO GIVE SUCH CONSIDERATION WOULD IN AND OF ITSELF RESULT IN SERIOUS DEPRIVATION OF FIRST AMENDMENT RIGHTS.

A.

FEDERAL COURTS ARE CONSTITUTIONALLY REQUIRED IN APPROPRIATE CASES TO PASS UPON THE CONSTITUTIONALITY OF CONGRESSAL SUBPOENAS.

It is beyond dispute that the federal courts have the power to rule on the constitutionality of a Congressional committee subpoena. See, United States v. Rumley, 345 U.S. 41 (1953); Watkins v. United States, 354 U.S. 178 (1957); Gojack v. United States, 384 U.S. 702 (1966); Yellin v. United States, 374 U.S. 109 (1963). That is all the Court of Appeals did below - it considered the constitutionality of a subponea issued by the Eastland Committee and found that it violated the First Amendment.

As the Court below noted, not even

petitioners can contend that the Speech or Debate Clause constitutes a "textually demonstrable commitment" of the issues to the Congress.

> The government does not contend that the Speech or Debate Clause, Art. 1, Sec. 6, Cl. 1 of the constitution is such a commitment and since it could not seriously be contended that the acts giving effect to the committee resolution (like the conduct of the Sergeant at Arms in the Kilbourn case) are within the protection of the Speech or Debate Clause, this Clause does not commit to the Senate the power to determine the legality of the subpoena. USSF v. Eastland, supra. App 67.

B.

THE SPEECH OR DEBATE CLAUSE DOES NOT IMMUNIZE FROM JUDICIAL REVIEW ALL ALLEGEDLY UNCONSTITUIONAL ACTS BY MEMBERS OF CONGRESS AND THEIR AIDES.

Although petitioners did not even mention the Speech or Debate Clause in

the Court of Appeals (they did in the District Court which rejected their contentions), they now vigorously assert that the Clause prevents the federal courts from scrutinizing the subpoenas herein, immunizing members of Congress and their aides from even federal declaratory and injunctive actions which challege the constitutionality of their actions, no matter what their nature.

Petitioners base the sweeping ban they would have this Court apply on eight cases in which this Court dealt with Speech or Debate Clause. Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S.

486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966) Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1881). The conclusions petitioners draw from those cases misconstrue the rulings of this Court which have, in fact, permitted not only declaratory and injunctive relief but civil damages and back pay against employees of Congress and legislative aides. Kilbourn v. Thompson, supra; Powell v. McCormack, supra; Dombrowski v. Eastland, supra.

In its most recent discussion of immunity, this Court reiterated that there are limits to the protections of the Speech or Debate Clause.As this Court noted in Gravel v. United States,

408 U.S. 606, 621 (1972):

> None of this, as we see it involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In Kilbourn-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So, too, in Eastland, as in this litigation, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in United States v. Johnson, 383 U.S. 169 (1966). (emphasis added)

Respondents contend that the seizure of their lists of depositors,

deposits, grantees and grants by use of unconstitutional subpoenas upon their banks is no less an illegal act than if the Members of Congress themselves or their aides, without color of such process" themselves seized the property" and thus "invaded the privacy of [the] citizens[s]." Therefore, "[n]either they nor their aides should be immune from ... question in such circumstances."

It is to be noted in this connection that the Gravel opinion does not shrink from withdrawing immunity even from liability although these respondents seek merely injunctive and declaratory relief.

Earlier, in Powell v. McCormack, supra, this Court reviewed the

long history of our Speech or Debate Clause and its British antecedents and outlined three different questions which arose regarding its application:

> 1. Whether respondents in participating in the exclusion of Powell were 'acting in the sphere of legitimate legislative activity,' Tenney v. Brandhove, supra at 376, 71 S.Ct. at 788;
> 2. Assuming that respondents were so acting, whether the fact that petitioners seek neither damages from any of the respondents nor a criminal prosecution lifts the bar of the clause; and
> 3. Even if this action may not be maintained against a Congressman, whether those respondents who are merely employees of the House may plead the bar of the clause.
>
> Powell v. McCormack, supra, 395 U.S. at 501-2. (footnotes omitted).

This Court then went on to say "we find it necessary to treat only the last of these issues," 395 U.S. at 502, and held that the Speech or Debate Clause does not act as a bar to action for

declaratory and injunctive relief(as well as back pay) against an employee of the House, even where the question was the constitutionally sensitive one of the decision by the House of Representatives to exclude one of its own members from the body.

In so deciding, this Court looked back to Kilbourn and Dombrowski, noting that the purpose of the Clause was to protect members of Congress from the distractions of litigation and that they would not be distracted by litigation against congressional employees.

As a matter of practice and reality, no Members are in fact "distracted" by litigation such as in the instant cases any more than they are "distracted" by a case involving an

attempt to punish an alleged violator of one of their subpoenas for contempt. Even when the Members are defendants, the situation is unchanged for they have the privilege (normally exercised by them) of legal representation by the Department of Justice and, should they chose for reasons of their own to retain private counsel, there are Committee budgets for that purpose. The fact that a Congressperson or Senator might be called for deposition or other testimony in the course of an action such as those here at issue is no different from the situation where such a legislator might be called to testify in a contempt prosecution as to the legislative purpose, scope and intent of the authorizing resolution or other

relevant fact. As has been most dramatically illustrated for all of us recently, not even the holder of the highest office is immune from judicial process.

There is thus no interference with legislative activity because the Federal courts have and are called upon to exercise their constitutional obligation to review the constitutionality of Congressional actions. As Mr. Chief Justice Warren stated:

> The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions. A legislator is no more or no less hindered or distracted by litigation against a legislative employee calling into question the employee's affirmative action than

> he would be by a lawsuit questioning the employee's failure to act. Nor is the distraction or hindrance increased because the claim is for salary rather than damages, or because the litigation questions action taken by the employee within rather than without the House. Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves. Powell v. McCormack, supra, 505.

This case is remarkably similar to Powell v. McCormack in that the defendants in each of these four actions include staff counsel of the Committee or subcommittee concerned. Although respondents urge, in conformity with Gravel and the opinion of the Court of Appeals herein, that Members have no broader immunity than their aides, full relief for the respondents in these cases may be decreed against

the defendant aide in each case. This Court may, thus, if it wishes, defer consideration of the immunity of the Members under the Speech or Debate Clause. Respondents most strongly argue, however, that the Court below was correct in retaining the Member defendants since their asserted immunity does not reach the issues posed by these cases.

C.

THE ACTIONS CHALLEGED IN THIS LITIGATION ARE NEITHER SPEECH NOR DEBATE.

In rejecting the Speech or Debate Clause as a bar to Federal Court action herein, the Court of Appeals drew a distinction between internal and external acts of Members. Looking back to Doe v. McMillan, supra, it noted that

litigation was barred against Members of Congress concerning text of a committee report or the introduction of particular material at a Committee hearing. Just as in United States v. Brewster, 408 U.S. 501 (1972) and United States v. Johnson, 383 U.S. 169 (1966), where the contents and motivation of floor speeches could not be criminally dealt with (although criminal and conspiratorial extramural acts with respect thereto could be), these internal Committee acts were held in McMillan to be purely intramural functions of the Congress just as literal speech or debate are such internal functions. In contrast to such internal activities within the ambit of the Speech or Debate Clause are activities of Members beyond the halls of Congress.

Should the Member go to the general public and read the same report with respect to which his contributions and activities inside Congress are protected by the Clause, his or her immunity from suit would disappear. "A Member of Congress may not with impunity publish a libel from the Speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official Committee report." USSF v. Eastland, supra, App. 68 quoted from Doe v. McMillan, supra.

The Court below then went on:

> Analogizing to the instant case, we think the Speech or Debate Clause does protect the senatorial parties from liability for authorizing even an unconstitutional subpoena, but does not protect whatever parties issue or

serve such a subpoena upon a third party. App. 68.

To state this proposition another way, when a Congressperson authorizes a subpoena, that is a purely legislative act for which he or she cannot be sued. When, however, he or she causes that subpoena, which carries the possibility of judicial enforcement, to be served, the congressperson has reached beyond the walls of Congress and such acts become subject to judicial scrutiny. The acts for which Senator Gravel and his aides were immunized was a traditionally protected act, the giving of a speech in Congress, not the reaching beyond the walls of the Senatein order to compel a private citizen or organization to appear before Congress or turn over private documents. Once the Member or

aide reaches out to the private citizen with compulsory process, such an act cannot realistically, traditionally, or legally be termed Speech or Debate within the meaning of the constitutional provision.

The real question that remains then, is, not whether the Court can act but how it can do so in such a way as to avoid "'needless friction' with a coordinate branch of the government" U.S.S.F. v. Eastland, supra, App. 58, quoting Ansara v. Eastland, 442 F. 2d 751, 753 (D.C. Cir. 1971). Or as the Court of Appeals stated only one year later herein:

> The judiciary has the duty 'of not lightly interfering with Congress' exercise of its legitimate powers.'
> U.S.S.F. v. Eastland, supra,

App. 58, quoting Sanders v. McClellan, 463 F. 2d 894, 902 (D.C. Cir. 1972).

The Court below went on to note that because of the desire not to interfere needlessly with Congress, the court has generally been unwilling to review the constitutionality of a federal subpoena prior to a proceeding for criminal contempt, and has therefore withheld equitable relief. The theory behind this policy, as articulated in Ansara v.Eastland, supra is that there will be several points at which the subpoenaed party can raise constitutional claims, including at the Subcommittee, Committee, house and trial court. The court noted however, that even the government has recognized that there is one major exception to that rule - when

the subpoena is served on a third party. Quoting again from Ansara v. Eastland, at App 61, the court stated:

> ... we first note that the plaintiffs will have an opportunity to present their constitutional objections to the Sub-Committee. Hence the case is to be distinguished, as government counsel points out, from one where plaintiffs were not subpoenaed and would have no way to claim their constitutional protections at the time of the committee's questioning.

The heart of this case is that if the federal court does not offer the relief plaintiffs' requested, there will be no relief at all. For as even the District Court recognized:

> Plaintiffs are not required to entrust the task of protecting their First Amendment rights to a third party [the Bank] which has little interest in doing so. See McSurely v. McClellan, No. 23, 845 (D.C. Cir. March 26, 1970), Slip Opinion at 8. Perlman v. United States, 247 U.S. 7, 12-13 (1918).

U.S.S.F. v. Eastland, Civ. Act,

No. 1474-70, June 4, 1970 (App. 25).

It is particularly important that plaintiffs-respondents have a remedy of their own if, as petitioners argue, there is no bank-depositor privilege which requires the bank to protect its depositor's records and assert its constitutional rights.

We are therefore in the situation which the Court of Appeals foresaw in Sanders and Ansara or, as the court below stated:

> Here, in this case, we have the case which is distinguished by this Court in both Sanders and Ansara and apparently by the government in its argument in the latter case. Here the plaintiffs have no alternative means to vindicate their rights. They cannot contest a subpoena issued on the Chemical Bank before the committee or before the Senate, and they cannot force the bank's uninvolved officials to run the

> risk of contempt citations and criminal trials to aid the plaintiffs in establishing their First Amendment rights.
> U.S.S.F. v. Eastland, supra, App. 61.

There are admittedly few situations in which the federal courts will exercise their jurisdiction to review a Congressional subpoena prior to compliance therewith or violation thereof. Such cases do, however, exist. One of them this Court recognized recently in United States v. Nixon, ____U.S. _____, 94 S.Ct. 3090,(1974) There the Court said (at 3099):

> The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. For example, in Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918) a subpoena had been directed to a third party requesting

certain exhibits; the appellant, who owned the exhibits, sought to raise a claim of privilege. The Court held an order compelling production was appealable because it was unlikely that the third party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege. Id., at 12-13, 38 S.Ct. at 419-420. That case fell within the "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." United States v. Ryan, supra, 402 U.S., at 533, 91 S. Ct., at 1582.

CONCLUSION

By arguing that the subpoenas are immune from judicial scrutiny by the respondents whose interests are most intimately involved in protecting the data sought, petitioners distort both the factual setting and the applicable law. Petitioners seek by indirect means of the bank subpoena to secure that very body of information which this Court has repeatedly held cannot be secured by direct means.

Petitioners rest heavily upon Alexander v. Americans United, _____U.S. _____, 94 S.Ct. 2053 (1974). That case, however, like Ansara v. Eastland, supra, serves only to underscore why Federal Court scrutiny and protective action in cases such as this are both appropriate

and necessary. As the Ansara court predicted when it refused to enjoin a subpoena directly served upon interested persons in possession of information respecting freedom of association and as this Court held in Americans United, anticipatory relief was not available because the interested parties had an alternative remedy, to wit, the ordinary process of review in one case in enforcement proceedings under a subpoena and the other under the provisions of the Internal Revenue Code. The absence of such alternative remedy for the respondents in this case requires that the Judiciary perform its constitutional duty in providing a forum for assertion and protection of First Amendment rights.

The protection of dissent and freedom of association are cornerstones of a free society and, although the sensibilities of members of one branch of government may be irritated when the judiciary exercises its mandate to provide the checks and balances contemplated by the Constitution, the courts have traditionally not shirked this responsibility.

Dated: January 3, 1975

Respectfully submitted,

NANCY STEARNS
c/o Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003

JEREMIAH S. GUTMAN
c/o American Civil Liberties Union Foundation
363 Seventh Avenue
New York, N.Y. 10001

BURT NEUBORNE
American Civil Liberties
Union
22 East 40th Street
New York, N.Y. 10016

PHILIP J. HIRSCHKOP
503 D Street, N.W.
Washington, D.C.

HOPE EASTMAN
American Civil Liberties
Union
410 First Street, S.E.
Washington, D.C.

Attorneys for Respond-
ents